

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Application of AC BidCo, LLC, Gogo Inc., and	)	WT Docket No. 12-155
LiveTV, LLC	)	
	)	
For Consent To Assign Commercial Aviation Air-	)	
Ground Radiotelephone (800 MHz band) License,	)	
Call Sign WQFX729	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 29, 2013**

**Released: March 29, 2013**

By the Chief, Wireless Telecommunications Bureau:

1. In this *Memorandum Opinion and Order* (“*Order*”), we consider the application of AC BidCo, LLC (“AC BidCo”), a wholly-owned subsidiary of Gogo Inc. (together with AC BidCo, “Gogo”), and LiveTV, LLC (“LiveTV”) (collectively, “the Applicants”) for waiver of section 22.853 of the Commission’s rules<sup>1</sup> and consent to the assignment of LiveTV’s one megahertz nationwide 800 MHz Commercial Aviation Air-Ground Radiotelephone Service (“Air-Ground”) license to Gogo,<sup>2</sup> which currently holds the nationwide license for the remaining three megahertz of Air-Ground spectrum.

2. The Commission placed the Application and waiver request on public notice and established a pleading cycle for petitions to deny.<sup>3</sup> No parties filed petitions to deny, oppositions, or other comments. Based on our review of the Application, including the competitive effects of Gogo’s post-transaction spectrum holdings in light of current market conditions, we find that Gogo’s acquisition of this spectrum is not likely to result in public interest harms, but would instead result in certain public interest benefits by making a more productive use of the Air-Ground spectrum and expanding the public’s access to wireless telecommunications and broadband services on board aircraft. Accordingly, we find that the requested waiver of section 22.853, as well as the proposed transaction, are in the public interest, and therefore, as discussed below, grant that waiver and consent to the transaction. We also grant Gogo’s request for a partial waiver of sections 22.861 and 22.863.

**I. BACKGROUND**

**A. 2004 Air-Ground Report and Order**

3. In December 2004, the Commission adopted an Order revising its rules pertaining to the four megahertz of spectrum in the 800 MHz Air-Ground services in 849-851 MHz and 894-896 MHz.<sup>4</sup> In

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<sup>1</sup> 47 C.F.R. § 22.853.

<sup>2</sup> ULS File No. 0005185165 (filed May 4, 2012) (“Application”).

<sup>3</sup> AC BidCo, LLC and LiveTV, LLC Seek FCC Consent to the Assignment of an 800 MHz Air-Ground Radiotelephone Service License and Request Rule Waivers, *Public Notice*, 27 FCC Rcd 7025 (2012) (“*Gogo Public Notice*”).

<sup>4</sup> Amendment of Part 22 of the Commission’s Rules to Benefit the Consumers of Air-Ground Telecommunications Services, WT Docket No. 03-103, *Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 4403 (2005) (“*Air-Ground Order*”).

adopting these rules, it sought to “promote key spectrum policy objectives that would lead to greater technical, economic, and marketplace efficiency” while responding to evolving market demands.<sup>5</sup> The Commission weighed the possible band plans and technical considerations at that time, and concluded that no more than three megahertz of spectrum was required for a licensee to deliver high-speed air-ground services using then-existing broadband technologies, and that a service offered over one megahertz of spectrum could provide a meaningful competitive alternative to other air-ground services, including satellite services.<sup>6</sup> It also was concerned that one megahertz of spectrum might end up “lying fallow” if one party controlled the Air-Ground band’s entire four megahertz of spectrum.<sup>7</sup>

4. As a result, the Commission adopted section 22.853, which provides that “[n]o individual or entity may hold, directly or indirectly, a controlling interest in licenses authorizing the use of more than three megahertz of spectrum (either shared or exclusive) in the 800 MHz commercial aviation Air-Ground Radiotelephone Service frequency bands.”<sup>8</sup> The Commission expressly noted, however, that it would “consider a waiver of the eligibility rule based on a showing that market conditions and other factors would favor common control of more than three megahertz without resulting in a significant likelihood of substantial competitive harm.”<sup>9</sup>

## **B. Description of Applicants**

5. Gogo Inc.,<sup>10</sup> a Delaware corporation headquartered in Illinois, reports that it is a leading provider of in-flight connectivity with the largest number of internet-connected aircraft in service.<sup>11</sup> Gogo Inc. operates through two indirect operating subsidiaries, Gogo LLC and Aircell Business Aviation Services LLC, and it holds its license for the Air-Ground band through a third subsidiary, AC BidCo.<sup>12</sup> In 2006, Gogo obtained the three megahertz license in the Air-Ground band in Auction 65 through AC BidCo.<sup>13</sup> The Commission determined Gogo was qualified to hold a Commission license prior to granting Gogo the license.<sup>14</sup>

6. Gogo has three operating segments: commercial aviation, business aviation, and international aviation.<sup>15</sup> In the U.S., Gogo uses a terrestrial-based Air-Ground network relying on its three megahertz license in the Air-Ground band.<sup>16</sup> On the commercial side, Gogo has partnerships with North American

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<sup>5</sup> *Id.* at 4407 ¶ 3.

<sup>6</sup> *Id.* at 4425 ¶ 41.

<sup>7</sup> *Id.*

<sup>8</sup> 47 C.F.R. § 22.853.

<sup>9</sup> *Air-Ground Order*, 20 FCC Rcd at 4426 ¶ 42.

<sup>10</sup> Gogo formerly was known as Aircell; *see* Gogo Inc., SEC Amendment No. 6 to Form S-1, at 1 (filed Nov. 8, 2012) (“Gogo Amended S-1”), *available at* <http://www.sec.gov/Archives/edgar/data/1537054/000119312512460818/d267959ds1a.htm>; *see also* ULS File No. 0005185165, Exhibit 1, *Public Interest Statement and Request for Waivers*, at 1 (filed May 4, 2012) (“Gogo/LiveTV Public Interest Statement”).

<sup>11</sup> Gogo Amended S-1 at 1; Gogo/LiveTV Public Interest Statement at 1.

<sup>12</sup> Gogo Amended S-1 at 1.

<sup>13</sup> Auction of 800 MHz Air-Ground Radiotelephone Service Licenses Closes; Winning Bidders Announced for Auction No. 65, *Public Notice*, 21 FCC Rcd 6304, 6312 (2006) (“*Auction 65 Public Notice*”).

<sup>14</sup> *Id.* at 6308. *See also* 47 C.F.R. § 1.2109.

<sup>15</sup> Gogo Amended S-1 at 1.

<sup>16</sup> Gogo/LiveTV Public Interest Statement at 1; *see also* Gogo Amended S-1 at 2.

airlines including Delta Air Lines, American Airlines, and US Airways.<sup>17</sup> Gogo makes broadband internet available on more than 1,600 commercial aircraft, including aircraft operated by Delta Air Lines, AirTran Airways, Virgin America, Air Canada, Alaska Airlines, American Airlines, Frontier Airlines, United Airlines, and US Airways.<sup>18</sup>

7. LiveTV, LLC is a wholly-owned subsidiary of JetBlue Airways Corporation (“JetBlue”) that provides in-flight entertainment, voice communication, and data connectivity services for commercial<sup>19</sup> and general aviation aircraft.<sup>20</sup> LiveTV obtained the one megahertz license in the Air-Ground band in Auction 65.<sup>21</sup> According to the Applicants, “JetBlue used the LiveTV license to trial a narrowband [air to ground] offering but discontinued the service [in 2011] after concluding that the limited bandwidth ‘wouldn’t be sustainable over a longer period of time when more and more customers want to use it.’”<sup>22</sup> The Applicants state that, at present, “the LiveTV license is only used to offer narrowband service to a small number of general aviation customers still using the legacy MagnaStar® system.”<sup>23</sup>

### C. Description of the Transaction

8. On May 4, 2012, the Applicants filed the Application pursuant to section 310(d) of the Communications Act of 1934, as amended,<sup>24</sup> seeking to assign LiveTV’s nationwide one megahertz Air-Ground band license, call sign WQFX729, to Gogo.<sup>25</sup> The Applicants seek a waiver of section 22.853 of the Commission’s rules, which forbids one party from holding more than three megahertz of spectrum in the Air-Ground band.<sup>26</sup> The Applicants allege that market conditions and technical developments justify this waiver due to increased consumer demand for in-flight broadband services and competition from satellite providers.<sup>27</sup> The Applicants, to allow for integration of the assigned spectrum, also seek partial

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<sup>17</sup> Gogo Amended S-1 at 1.

<sup>18</sup> Gogo/LiveTV Public Interest Statement at 4; *see also* Letter from Michele C. Farquhar, Counsel for Gogo, to Marlene Dortch, Secretary, Federal Communications Commission, Attachment at 1 (filed Dec. 3, 2012) (“Gogo Ex Parte”); Gogo Amended S-1 at 1-2.

<sup>19</sup> LiveTV currently provides service to JetBlue, United, WestJet, Frontier, Azul, Virgin Australia, and Alitalia. *See* <http://www.livetv.net/customers.aspx> (viewed on Feb. 4, 2013).

<sup>20</sup> *See* JetBlue Airways Corporation, SEC Form 10-K, at 11 (filed Feb. 28, 2012) (“JetBlue Form 10-K”), *available at* <http://www.sec.gov/Archives/edgar/data/1158463/000119312512084229/d273260d10k.htm>; *see also* Gogo/LiveTV Public Interest Statement at 1. JetBlue offers commercial airline services. *See* JetBlue Form 10-K at 1.

<sup>21</sup> *Auction 65 Public Notice*, 21 FCC Rcd at 6312.

<sup>22</sup> Gogo/LiveTV Public Interest Statement at 3 (quoting Will Horton, Airlines Feel the Need for Wi-Fi Speed, Airline Passenger Experience Association Editor’s Blog (Feb. 16, 2012), <http://blog.apex.aero/ife/airlines-feel-wifi-speed/> (quoting JetBlue director of product development Rachel McCarthy)). JetBlue is instead relying on a satellite-based system. Gogo/LiveTV Public Interest Statement at 3.

<sup>23</sup> Gogo/LiveTV Public Interest Statement at 3. MagnaStar® is the legacy in-flight telephone and data service for general aviation customers previously operated by Verizon Airfone. *Id.* at n.11.

<sup>24</sup> 47 U.S.C. § 310(d).

<sup>25</sup> Gogo/LiveTV Public Interest Statement at 1.

<sup>26</sup> *Id.*; *see also* 47 C.F.R. § 22.853.

<sup>27</sup> *See* Gogo/LiveTV Public Interest Statement at 2.

waiver of two technical operational rules: section 22.861 regarding emission limitations<sup>28</sup> and section 22.863 regarding frequency stability.<sup>29</sup>

9. On June 19, 2012, the Commission released a *Public Notice* accepting the Application for filing, with petitions to deny due July 3, 2012, oppositions due July 13, 2012, and replies due July 20, 2012.<sup>30</sup> No petitions to deny or other comments were filed. On February 12, 2013, and February 21, 2013, the Applicants supplemented their Application with additional information.<sup>31</sup>

## II. WAIVER OF SECTION 22.853

10. Pursuant to section 1.925(b)(3) of the Commission's rules, parties seeking a waiver must demonstrate that:

- (i) The underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or
- (ii) In view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.<sup>32</sup>

11. As described below, we find that the Applicants have demonstrated that a waiver of section 22.853's prohibition against one licensee holding all four megahertz in the Air-Ground band will serve the public interest. We agree with the Applicants that a waiver of section 22.853 is warranted because "market conditions now favor common control of the four megahertz of [Air-Ground] spectrum based on consumer expectations for in-flight broadband offerings, and vibrant competition by satellite providers quells any concern about competitive harm" and that "[a]pplication of Section 22.853 in these circumstances would frustrate the purpose of the rule."<sup>33</sup>

12. In adopting the eligibility restriction in section 22.853 in the *Air-Ground Order*, the Commission expressly sought to promote "greater technical, economic, and marketplace efficiency" in the Air-Ground band.<sup>34</sup> In crafting the rule, the Commission sought to "encourage the use of more innovative, spectrum-efficient technologies that could be utilized in [the Air-Ground] spectrum and . . . promote deployment of such technology."<sup>35</sup> It concluded that its "flexible approach to configuration of the band will promote [the Commission's] goal . . . of facilitating the highest valued use of this scarce spectrum resource, resulting in the provision of wireless communications services that better meet the needs of the traveling public onboard aircraft."<sup>36</sup> Based on the technical developments and market conditions at that time, the Commission determined that adopting section 22.853 would well position providers of broadband air-ground service in the Air-Ground band to compete against satellite-delivered

<sup>28</sup> 47 C.F.R. § 22.861.

<sup>29</sup> *Id.* § 22.863.

<sup>30</sup> *Gogo Public Notice* at 1.

<sup>31</sup> ULS File No. 0005185165, *Declaration in Support of the Request for Waiver*, at 2 (filed Feb. 12, 2013) ("LiveTV Declaration"); *Gogo LLC Supplemental Update to Application and Waiver Request* (filed Feb. 21, 2013) ("Gogo Supplemental Update").

<sup>32</sup> 47 C.F.R. § 1.925(b)(3).

<sup>33</sup> *Gogo/LiveTV Public Interest Statement* at 2.

<sup>34</sup> *Id.* at 4407 ¶ 3.

<sup>35</sup> *Id.* at 4418 ¶ 24.

<sup>36</sup> *Id.* at 4421 ¶ 30.

broadband services to aircraft.<sup>37</sup> As described above, the Commission also determined when it adopted section 22.853 that a waiver of the eligibility rule in the future may be warranted “based on a showing that market conditions and other factors would favor common control of more than three megahertz without resulting in a significant likelihood of substantial competitive harm.”<sup>38</sup>

13. The Applicants assert that market and technological conditions have sufficiently changed since 2004 to warrant a waiver, and that grant of the requested waiver presents no adverse competitive effects.<sup>39</sup> The Applicants argue that “the significant increase in competition from satellite providers mitigates any concern about competitive harm,” and that the waiver and transaction will yield substantial public interest benefits.<sup>40</sup> The Applicants assert that several satellite providers now offer in-flight wireless services, and a large number of airlines, including JetBlue, are using these services.<sup>41</sup> For example, in January 2013, Row 44, Inc., which provides in-flight broadband services for Southwest Airlines and several international carriers, announced that it had installed its service on its 400th aircraft.<sup>42</sup> In addition, Panasonic Avionics provides in-flight broadband services to United Airlines and several international airlines, and on January 15, 2013, United Airlines announced it had outfitted a Boeing 747 with Panasonic Ku-band satellite technology and that it planned to install satellite-based Wi-Fi on numerous aircraft models in its fleet.<sup>43</sup> JetBlue, the current licensee of the one megahertz of Air-Ground spectrum through LiveTV, asserts that it has partnered with ViaSat Inc. for the provision of in-flight broadband services via satellite after determining that the one megahertz of Air-Ground spectrum was insufficient to provide a quality broadband service.<sup>44</sup> ViaSat also has contracted to install its air-to-ground broadband service onto aircraft operated by United Airlines, with 370 total aircraft scheduled to be online by the end of 2015.<sup>45</sup> We are persuaded by these facts, and by Applicants’ argument that

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<sup>37</sup> *Id.* at 4407 ¶ 3.

<sup>38</sup> *Id.* at 4426 ¶ 42.

<sup>39</sup> Gogo has filed an application to operate 1000 Ku-band transmit-receive earth stations on board aircraft in order to expand its in-flight broadband service offerings from the contiguous U.S. and portions of Alaska served by the current air-ground network to provide continuous in-flight connectivity on transoceanic and other international flights. *See* Gogo LLC Application for Blanket Authority for Operation of 1000 Technically Identical Ku-Band Transmit/Receive Earth Stations in the Aeronautical Mobile Satellite Service, File No. SES-LIC-20120619-00574, Exhibit at 2 (filed June 19, 2012).

<sup>40</sup> Gogo/LiveTV Public Interest Statement at 5; *see also* Gogo Ex Parte, Attachment at 2.

<sup>41</sup> *See* Gogo/LiveTV Public Interest Statement at 5; *see also* Gogo Ex Parte, Attachment at 2.

<sup>42</sup> *See* Gogo Supplemental Update at 2-3 (citing Press Release, Row 44, Inc., Southwest Airlines and Row 44 Announce Milestone in Wi-Fi Partnership (Jan. 22, 2013), <http://new.row44.com/southwest-airlines-and-row-44-announcemilestones-in-wi-fi-partnership/>); *see also* Gogo/LiveTV Public Interest Statement at 5 (citing Press Release, Row 44, Inc., *Row 44 Equips 250th Plane* (March 3, 2012), <http://row44.com/news-post/row-44-equips250th-plane/>).

<sup>43</sup> *See* Gogo Supplemental Update at 1-2 (citing Press Release, United Airlines, United Airlines Launches Satellite Based Wi-Fi Service (Jan. 15, 2013), <http://ir.unitedcontinentalholdings.com/phoenix.zhtml?c=83680&p=irolnewsArticle&ID=1774764&highlight=>); *see also* Gogo/LiveTV Public Interest Statement at 5 (citing Andrew Moran, *United Continental Selects Panasonic to Install Wi-Fi on Flights*, Digital Journal (Nov. 8, 2011), <http://www.digitaljournal.com/article/314081>); Gogo Ex Parte, Attachment at 2.

<sup>44</sup> *See* Gogo/LiveTV Public Interest Statement at 5 (citing Jeffrey Hill, *ViaSat, JetBlue Finalize Plans for Ka-band In-flight Service*, Satellite Today (April 5, 2011), [http://www.satellitetoday.com/twitter/ViaSat-JetBlue-Finalize-Plans-for-Ka-band-In-flight-Service\\_36491.html](http://www.satellitetoday.com/twitter/ViaSat-JetBlue-Finalize-Plans-for-Ka-band-In-flight-Service_36491.html)); *see also* Gogo Ex Parte, Attachment at 2.

<sup>45</sup> *See* Gogo Supplemental Update at 3 (citing Press Release, ViaSat Inc., New Exede Internet for Commercial Airlines from ViaSat Designed to Deliver 12 Mbps to Each Passenger In-Flight (Sept. 9, 2012), (continued....)



“newer satellite services, such as those to be launched in the Ka band, are much more cost-effective than the technology available in 2004, making them stronger competitors to a terrestrial-based network.”<sup>46</sup>

14. The Applicants also argue that more than three megahertz of Air-Ground spectrum is necessary today to provide the full array of high-speed wireless communications services the Commission intended for consumers on commercial flights in adopting its Air-Ground rules in 2004.<sup>47</sup> According to the Applicants, “rapidly increasing demand for Gogo’s service is pushing the bounds of its current spectrum capacity,” and Gogo requires the additional one megahertz of spectrum to relieve capacity pressure on its network.<sup>48</sup> Gogo contends that to support its “ever increasing numbers of users with ever increasing bandwidth demands,” it has had to engineer an “innovative solution to maximize the use of its three megahertz of spectrum” called ATG4.<sup>49</sup> Gogo also alleges, however, that it foresees more capacity constraints in the future, and, “[t]o support continued growth and competition, Gogo must increase the spectrum available to its terrestrial network and/or use satellite networks to supplement its capacity.”<sup>50</sup>

15. Gogo further asserts that, counter to the Commission’s concern in 2004 that if all four megahertz were licensed to a single entity, the fourth megahertz of Air-Ground spectrum would lay fallow, LiveTV’s spectrum is in fact integral to Gogo’s future business plans, with Gogo investigating a “number of capacity enhancing techniques using this spectrum.”<sup>51</sup> Gogo argues that it is “uniquely positioned to make productive use of the 1 MHz license.”<sup>52</sup> In addition, LiveTV recounts that it spent more than a year searching for an entity interested in redeveloping the one megahertz of Air-Ground spectrum, but the only party that could make use of the spectrum was Gogo.<sup>53</sup>

16. While the Commission previously concluded that one megahertz of spectrum in the Air-Ground band had “many potential uses,”<sup>54</sup> LiveTV’s submissions demonstrate that it made numerous efforts to provide services using the spectrum, and that, in its experience, a stand-alone one megahertz license has limitations in the marketplace. LiveTV has been unable to successfully offer such services using its Air-Ground license.<sup>55</sup> LiveTV asserts that it purchased the one megahertz license in Auction 65 “intending to augment its in-seat live television product with email and Internet services available to domestic commercial aircraft” and, at the time, it “believed there was a market for messaging and low bandwidth applications” that would cost airlines relatively little compared to similar services from

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<http://www.viasat.com/news/newexede-internet-for-commercial-airlines-viasat-designed-deliver-12-mbps-each-passenger-flight>).

<sup>46</sup> Gogo/LiveTV Public Interest Statement at 5 (citing Fred George, *Next-Gen Wi-Fi Soars*, Aviation Week & Space Technology (Feb. 27, 2012)).

<sup>47</sup> See *Air-Ground Order*, 20 FCC Rcd at 4418, 4421 ¶¶ 24, 30-31.

<sup>48</sup> Gogo/LiveTV Public Interest Statement at 4; see also Gogo Ex Parte, Attachment at 1.

<sup>49</sup> Gogo Supplemental Update at 4-5. Gogo explains that “ATG4 involves upgrading the ground network from EvDO Rev A to EvDO Rev B as the RF link, along with installing directional antenna and dual (Rev B) modems on the aircraft.” *Id.* at 5. Despite these network upgrades aimed at addressing capacity constraints, Gogo foresees its “three megahertz of spectrum . . . facing capacity constraints again.” *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Gogo/LiveTV Public Interest Statement at 4; see also Gogo Ex Parte, Attachment at 1.

<sup>52</sup> Gogo Supplemental Update at 5.

<sup>53</sup> LiveTV Declaration at 2.

<sup>54</sup> *Air-Ground Order*, 20 FCC Rcd at 4425 ¶ 41.

<sup>55</sup> LiveTV Declaration at 1.

emerging satellite providers.<sup>56</sup> LiveTV contends that it invested considerable time and money into creating this system, but after a two-year trial, JetBlue discontinued use of the product after concluding that the limited bandwidth could not support its customers' demands for broadband capabilities.<sup>57</sup> LiveTV also points out that only one other major domestic airline expressed interest in its service but ultimately decided against it.<sup>58</sup> According to LiveTV, "[b]y 2010, passenger expectations industry-wide had exceeded the limitations 1 MHz of spectrum could support as other Internet providers with technology capable of greater bandwidth gained market share."<sup>59</sup> LiveTV alleges that once the one megahertz license proved infeasible for use on commercial airlines, it started to provide service to the business aviation market, but it has determined that this market does not provide enough revenue to keep operating the network.<sup>60</sup> As discussed above, rather than relying on the LiveTV service provided over Air-Ground spectrum, JetBlue instead will now deploy a satellite-based system for commercial and general aviation aircraft.<sup>61</sup>

17. We find that granting the requested waiver of section 22.853 is in the public interest. Based on the record before us, we find, as a result of developments since 2004, that there is sufficient competition for the services Gogo provides and that granting this waiver affords Gogo the opportunity to make full use of the Air-Ground band post-transaction as intended by the Commission in the *Air-Ground Order*, at the same time ensuring that the remaining one megahertz of Air-Ground spectrum does not lie fallow.<sup>62</sup> Accordingly, we conclude that the Applicants have met the waiver standard set forth in section 1.925 of the Commission's rules, and we grant the Applicants' requested relief. Consistent with our treatment of similar waiver requests, this waiver is limited to Gogo and its holding of the combined one megahertz and three megahertz Air-Ground licenses. Should Gogo seek to assign the licenses to another entity wishing to operate in accordance with the waiver we grant in this *Order*, that entity will need to seek its own waiver.

### III. STANDARD OF REVIEW AND PUBLIC INTEREST ANALYSIS UNDER SECTION 310(D)

18. In making our assessment under section 310(d), we first assess whether the proposed transaction complies with the specific provisions of the Communications Act,<sup>63</sup> other applicable statutes,

<sup>56</sup> *Id.* at 1. LiveTV also purchased the Airfone business and network assets from GTE Wireless Corporation because it utilized the same air-to-ground spectrum. *Id.*

<sup>57</sup> *Id.*; see also Gogo/LiveTV Public Interest Statement at 3; Gogo Ex Parte, Attachment at 2.

<sup>58</sup> LiveTV Declaration at 1.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 1-2.

<sup>61</sup> See Gogo/LiveTV Public Interest Statement at 3; Gogo Ex Parte, Attachment at 2. Under the proposed transaction, Gogo would acquire LiveTV's existing general aviation customers and offer to transition them to a Gogo service plan, ensuring no discontinuance of service. Gogo/LiveTV Public Interest Statement at 3; Gogo Ex Parte, Attachment at 2.

<sup>62</sup> See *Air-Ground Order*, 20 FCC Rcd at 4425 ¶ 41.

<sup>63</sup> Section 310(d) requires that we consider the application as if the proposed assignee was applying for the licenses directly under section 308 of the Act, 47 U.S.C. § 308. See, e.g., Applications of AT&T Mobility Spectrum LLC, New Cingular Wireless PCS, LLC, Comcast Corporation, Horizon Wi-Com, LLC, NextWave Wireless, Inc., and San Diego Gas & Electric Company For Consent to Assign and Transfer Licenses, WT Docket No. 12-240, *Memorandum Opinion and Order*, 27 FCC Rcd 16459, 16463-64 ¶ 10 (2012) ("*AT&T-WCS Order*"); Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cox TMI, LLC For Consent To Assign AWS-1 Licenses, WT Docket No. 12-4, *Memorandum Opinion and Order and Declaratory Ruling*, 27 FCC Rcd 10698, 10710 ¶ 28 (2012) ("*Verizon Wireless-SpectrumCo Order*"); Application of AT&T Inc. and Qualcomm Incorporated (continued....)

and the Commission's rules.<sup>64</sup> If the transaction does not violate a statute or rule, we next consider whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes.<sup>65</sup> We then employ a balancing test weighing any potential public interest harms of the proposed transaction against any potential public interest benefits.<sup>66</sup> The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, will serve the public interest.<sup>67</sup>

19. Because the Applicants seek a waiver of the prohibition in section 22.853 against one licensee holding both Air-Ground licenses, and because that prohibition was enacted in order to protect competition, our waiver analysis in Section II and our public interest analysis under Section 310(d) overlap. Having granted the Applicants a waiver of section 22.853, we now find that, while the proposed transaction will result in only one entity holding all of the spectrum in the Air-Ground band, on balance the public interest benefits resulting from the contemplated transaction outweigh the likelihood and nature of any potential anticompetitive harm. We also conclude that the proposed transaction is otherwise consistent with the Communications Act and Commission rules except as waived in this *Order*, and we find that grant of the application is therefore in the public interest.

#### A. Qualifications of Applicants

20. Among the factors the Commission considers in its public interest review is whether the applicant for a license has the requisite "citizenship, character, financial, technical, and other qualifications."<sup>68</sup> Therefore, as a threshold matter, the Commission must determine whether the applicants to the proposed transaction meet the requisite qualifications requirements to hold and transfer licenses under section 310(d) of the Communications Act and the Commission's rules.<sup>69</sup>

21. When evaluating transfers of control or assignments under section 310(d), the Commission does not, as a general rule, re-evaluate the qualifications of the assignor or transferor unless issues related to basic qualifications have been designated for hearing by the Commission or have been sufficiently raised in petitions to warrant the designation of a hearing.<sup>70</sup> There has been no such designation for

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For Consent to Assign Licenses and Authorizations, WT Docket No. 11-18, *Order*, 26 FCC Rcd 17589, 17598 ¶ 23 (2011) ("*AT&T-Qualcomm Order*").

<sup>64</sup> See, e.g., *AT&T-WCS Order*, 27 FCC Rcd at 16463-64 ¶ 10; *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10710 ¶ 28; *AT&T-Qualcomm Order*, 26 FCC Rcd at 17598 ¶ 23.

<sup>65</sup> See, e.g., *AT&T-WCS Order*, 27 FCC Rcd at 16463-64 ¶ 10; *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10710 ¶ 28; *AT&T-Qualcomm Order*, 26 FCC Rcd at 17598-99 ¶ 23.

<sup>66</sup> See, e.g., *AT&T-WCS Order*, 27 FCC Rcd at 16463-64 ¶ 10; *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10710 ¶ 28; *AT&T-Qualcomm Order*, 26 FCC Rcd at 17599 ¶ 23.

<sup>67</sup> See, e.g., *AT&T-WCS Order*, 27 FCC Rcd at 16463-64 ¶ 10; *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10710 ¶ 28; *AT&T-Qualcomm Order*, 26 FCC Rcd at 17599 ¶ 23.

<sup>68</sup> 47 U.S.C. §§ 308, 310(d); see also, e.g., *AT&T-WCS Order*, 27 FCC Rcd at 16466 ¶ 17; *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10712 ¶ 33; *AT&T-Qualcomm Order*, 26 FCC Rcd at 17600 ¶ 27; Applications of AT&T Inc. and Cellco Partnership d/b/a Verizon Wireless, WT Docket No. 09-104, *Memorandum Opinion and Order*, 25 FCC Rcd 8704, 8718 ¶ 26 (2010) ("*AT&T-Verizon Wireless Order*").

<sup>69</sup> See 47 U.S.C. § 310(d); 47 C.F.R. § 1.948; see also, e.g., *AT&T-WCS Order*, 27 FCC Rcd at 16466 ¶ 17; *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10712 ¶ 33; *AT&T-Qualcomm Order*, 26 FCC Rcd at 17560-61 ¶ 27; *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8718 ¶ 26.

<sup>70</sup> See, e.g., *AT&T-WCS Order*, 27 FCC Rcd at 16466 ¶ 18; Applications of AT&T Inc. and Centennial Communications Corp. For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Leasing Arrangements, WT Docket No. 08-246, *Memorandum Opinion and Order*, 24 FCC Rcd 13915, 13931 ¶ 33 (2009) ("*AT&T-Centennial Order*"); Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC (continued....)



hearing of the basic qualifications of LiveTV, nor have any issues been sufficiently raised here that would warrant a hearing designation, and we therefore see no reason to re-evaluate the qualifications of LiveTV.

22. Section 310(d) does obligate the Commission to consider whether the proposed assignee is qualified to hold Commission licenses.<sup>71</sup> No issues have been raised with respect to the basic qualifications of the proposed assignee, Gogo, which we previously have found qualified, through its subsidiary, to hold Commission licenses. We therefore find that there is no reason to re-evaluate Gogo's basic qualifications.

#### **B. Evaluation Under Section 310(d)**

23. Our public interest evaluation under section 310(d) necessarily encompasses the "broad aims of the Communications Act," which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, and generally managing the spectrum in the public interest.<sup>72</sup> Our public interest analysis also can entail assessing whether the proposed transaction will affect the quality of communications services or result in the provision of new or additional services to consumers.<sup>73</sup> In conducting this analysis, we may consider technological and market changes, and the nature, complexity, and speed of change of, as well as trends within, the communications industry.<sup>74</sup> Under the Commission's "sliding scale approach" to evaluating benefit claims,<sup>75</sup> where potential harms appear less likely and less substantial, as is the case here, we will accept a lesser showing to approve the transaction.

24. As discussed above in the context of our evaluation of the Applicants' request for a waiver of section 22.853, we conclude that the proposed transaction is unlikely to result in competitive or other public interest harms and that Gogo is unlikely to be able to act anticompetitively if we were to approve the transaction. As the Commission intended in the *Air-Ground Order*, we are allowing the band's use to "respond to evolving market demands."<sup>76</sup> The market has sufficiently changed such that satellite service providers now offer a true alternative to service in the Air-Ground band, providing competition in the provision of telecommunications services to the public onboard aircraft. Further, LiveTV was unable to put its one megahertz of nationwide spectrum in the Air-Ground band to efficient use, and was not engaged in active competition against Gogo.

25. As also explained above, we find that the proposed transaction likely would result in certain transaction-specific public interest benefits. We believe that this transaction would facilitate a more productive and efficient use of the band, one that more closely matches the Commission's stated goals in

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For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and *De Facto* Transfer Leasing Arrangements and Petition for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Communications Act, WT Docket No. 08-95, *Memorandum Opinion and Order and Declaratory Ruling*, 23 FCC Rcd 17444, 17466 ¶ 33 (2008) ("*Verizon Wireless-ALLTEL Order*").

<sup>71</sup> See, e.g., *AT&T-WCS Order*, 27 FCC Rcd at 16466-67 ¶ 19; *AT&T-Centennial Order*, 24 FCC Rcd at 13931 ¶ 33; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17466 ¶ 33.

<sup>72</sup> See, e.g., *AT&T-WCS Order*, 27 FCC Rcd at 16464 ¶ 11; *AT&T-Centennial Order*, 24 FCC Rcd at 13928 ¶ 28; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17461 ¶ 27.

<sup>73</sup> See, e.g., *AT&T-WCS Order*, 27 FCC Rcd at 16464 ¶ 11; *AT&T-Centennial Order*, 24 FCC Rcd at 13928 ¶ 28; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17461 ¶ 27.

<sup>74</sup> See, e.g., *AT&T-WCS Order*, 27 FCC Rcd at 16464 ¶ 11; *AT&T-Centennial Order*, 24 FCC Rcd at 13928 ¶ 28; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17461 ¶ 27.

<sup>75</sup> See, e.g., *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10735 ¶ 98; *AT&T-Qualcomm Order*, 26 FCC Rcd at 17624 ¶ 85; *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8737 ¶ 76.

<sup>76</sup> *Air-Ground Order*, 20 FCC Rcd at 4407 ¶ 3.

the *Air-Ground Order*.<sup>77</sup> As a result of the transaction, through holding four megahertz of spectrum nationwide, Gogo may be able to provide its consumers with an expansion of and improvement in wireless telecommunications services via the Air-Ground band in aircraft. We therefore conclude that the proposed transaction would serve the public interest.

**C. Waiver of Sections 22.861 and 22.863**

26. Gogo also seeks a partial waiver of two technical operational Commission rules, sections 22.861<sup>78</sup> (emission limitations) and 22.863<sup>79</sup> (frequency stability). Gogo claims that partial waiver of these rules will “ensure Gogo’s ability to integrate the spectrum in the most efficient manner.”<sup>80</sup> Once LiveTV’s license is assigned to Gogo, Gogo will hold two separate but contiguous Air-Ground licenses, with the common boundaries between the two licenses at 850.5 MHz for ground transmitters and at 895.5 MHz for airborne transmitters (“Internal Boundaries”).<sup>81</sup> Section 22.861 establishes an out-of-band emission limit for any emissions falling outside of “authorized operating frequency ranges,”<sup>82</sup> while section 22.863 requires that the frequency stability of any equipment used be sufficient to ensure that the occupied bandwidth of fundamental emissions “remains within the authorized frequency bands of operations.”<sup>83</sup>

27. Gogo seeks a partial waiver of these rules “to clarify that the limits imposed by Sections 22.861 and 22.863 will not apply at the Internal Boundaries.”<sup>84</sup> Gogo asserts that it does not seek any waiver of these rules with regard to the external boundaries of its licenses and “will continue to provide the same level of protection to adjacent channel licensees as required by the rules.”<sup>85</sup> We approve Gogo’s request for a partial waiver of sections 22.861<sup>86</sup> and 22.863,<sup>87</sup> and note that the rules will remain in place with regard to the external boundaries, and, thus, Gogo will be required to provide the same level of protection to adjacent channel licensees. Similarly to the waiver of section 22.853 that we grant in this order, these waivers are limited to Gogo and its holding of the combined one megahertz and three megahertz Air-Ground licenses. Should Gogo seek to assign the licenses to another entity wishing to operate in accordance with the waiver we grant in this *Order*, that entity will need to seek its own waiver. We find that granting these partial waivers would not frustrate the underlying purpose of these rules as the waivers would apply only to the Internal Boundaries, which are unnecessary if a single licensee holds both Air-Ground licenses and provides service across all four megahertz.<sup>88</sup> We also believe that the public interest would be served by this partial waiver because it will allow Gogo more flexibility to integrate operations across the spectrum covered by the two licenses without any offsetting harms.

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<sup>77</sup> See *id.* at 4407 ¶ 3.

<sup>78</sup> 47 C.F.R. § 22.861.

<sup>79</sup> *Id.* § 22.863.

<sup>80</sup> Gogo/LiveTV Public Interest Statement at 6.

<sup>81</sup> See *id.*

<sup>82</sup> 47 C.F.R. § 22.861(a).

<sup>83</sup> *Id.* § 22.863.

<sup>84</sup> Gogo/LiveTV Public Interest Statement at 6.

<sup>85</sup> *Id.*

<sup>86</sup> 47 C.F.R. § 22.861(a).

<sup>87</sup> *Id.* § 22.863.

<sup>88</sup> See *id.* § 1.925(b).

#### IV. CONCLUSION

28. We find that the requested waiver of section 22.853 and the partial waivers of sections 22.861 and 22.863 are warranted. We also find that the proposed transaction is unlikely to result in any public interest harms and that it is likely to result in certain public interest benefits, including fostering broadband in the Air-Ground band. Because these public interest benefits outweigh any potential public interest harms, we conclude that consent to the proposed transaction would serve the public interest.

#### V. ORDERING CLAUSES

29. Accordingly, having reviewed the application and the record in this matter, IT IS ORDERED that, pursuant to sections 4(i) and (j), 309, 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 309, 310(d), the application for the assignment of call sign WQFX729 from LiveTV to Gogo IS GRANTED.

30. IT IS FURTHER ORDERED, pursuant to section 1.925(b)(3) of the Commission's rules, 47 C.F.R. § 1.925(b)(3), that sections 22.853, 22.861, and 22.863 of the Commission's rules, 47 C.F.R. §§ 22.853, 22.861, and 22.863, ARE WAIVED to the extent described herein.

31. IT IS FURTHER ORDERED that this Order SHALL BE EFFECTIVE upon release. Petitions for reconsideration under section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, may be filed within thirty days of the date of public notice of this Memorandum Opinion and Order.

32. This action is taken under delegated authority pursuant to sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Ruth Milkman  
Chief, Wireless Telecommunications Bureau